

1 ARIZONA VOICE FOR CRIME VICTIMS

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8 **IN THE ARIZONA SUPREME COURT**

9 IN THE MATTER OF:

R-18-0001

10 PETITION TO AMEND THE
11 ARIZONA RULES OF CRIMINAL
12 PROCEDURE

PETITIONER'S REPLY

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16 Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Arizona
17 Voice for Crime Victims (AVCV) submitted a petition on January 3, 2018 seeking
18 to integrate the rights guaranteed to victims by the Arizona Victims' Bill of Rights
19 (VBR), Ariz. Const. art. II, § 2.1, and the Victims' Rights Implementation Act
20 (VRIA), Title 13, Chapter 40 of the Arizona Revised Statutes, throughout each
21 applicable rule provision and to repeal Rule 39. After receiving feedback from
22 various interested agencies and organizations, AVCV joined in a comment filed by
23 the Maricopa County Attorney's Office (MCAO) on May 21, 2018 (hereinafter
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1 referred to as the “joint comment”) in which modifications to AVCV’s original
2 petition were submitted for this Court’s consideration. Comments were also filed
3 by the Arizona Prosecuting Attorney’s Advisory Council (APAAC), the Hon. Sam
4 Myers, Criminal Presiding Judge of the Maricopa County Superior Court (Hon.
5 Sam Myers), the State Bar of Arizona (State Bar), and a joint comment filed by the
6 Arizona Public Defender’s Association (APDA) and the Arizona Attorneys for
7 Criminal Justice (AACJ). While APAAC generally supports AVCV’s petition
8 seeking to integrate victims’ rights, the others are opposed. The comments consist
9 of both general and specific concerns, which AVCV addresses in this reply.
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12 **General Concerns**

13 ***Party Status***

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15 There is a general concern throughout the comments filed by APAAC, the
16 State Bar, and APDA/AACJ that AVCV seeks to have victims elevated to the
17 status of a party. Arizona case authority is clear on the matter; victims of crime are
18 not parties to a criminal prosecution. *State v. Lamberton*, 183 Ariz. 47 (1995)
19 (victim not an aggrieved party with standing to file her own petition for review in a
20 Rule 32 proceeding); *Lindsay R. v. Cohen*, 236 Ariz. 565 (App. 2015) (noting VBR
21 did not make victims parties). AVCV does not seek to elevate victims to the status
22 of a party. Rather, AVCV seeks to ensure that trial courts and attorneys are aware
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1 of each applicable situation where a victim may assert a right guaranteed by the
2 VBR or the VRIA.

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4 Despite not being a party to a criminal proceeding, victims do have standing
5 as participants with enforceable constitutional rights that may be asserted during
6 the process. A.R.S. § 13-4437(A); Steven J. Twist & Keelah E.G. Williams,
7 *Twenty-Five Years of Victims' Rights in Arizona*, 47 Ariz. St. L.J. 421 (2015). The
8 VRIA recognizes that victims may participate in a criminal proceeding to assert
9 and enforce rights guaranteed under the VBR. A “victim has standing to seek an
10 order, to bring a special action or to file a notice of appearance in an appellate
11 proceeding, seeking to enforce any right to challenge an order denying any
12 right...” A.R.S. § 13-4437(A); *State ex rel. Montgomery v. Padilla*, 238 Ariz. 560,
13 566 (App. 2015) (A request for an order in a criminal case must be timely, in
14 writing, served and filed with the court. For victims, the subject matter of such a
15 request is limited and must be directed to enforcing any right or to challenging an
16 order denying any right guaranteed to victims). Thus, the fact that a victim or
17 victim’s attorney may assert rights by filing a written motion, a response, or a reply
18 does not mean that victims are elevated to party status. It is simply the direction
19 provided by or Court of Appeals or an appropriate wat to seek and order.

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21 The purpose of AVCV’s petition seeking to integrate the Rules of Procedure
22 is not to make victims a party to a criminal proceeding. Rather, it is to ensure that
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1 trial court judges and attorneys receive the proper guidance on when victims'
2 rights apply in relation to the remainder of the Rules. This guidance is generally
3 lacking in Rule 39, which is evidenced by the belief that a victim is not entitled to
4 file a written motion, response, or reply. While Rule 39 plainly states what rights
5 victims' have, it gives little direction of how each individual right should be
6 applied in various situations. Integration, on the other hand, will specifically lay
7 out when victims' rights are implicated and must be considered throughout the
8 criminal justice process.

11 ***Rule Making Authority***

12 The very language of the VBR justifies full integration in that it mandates
13 "all rules governing criminal procedure and the admissibility of evidence in all
14 criminal proceedings protect victims' rights." Ariz. Const. art. II, § 2.1(A)(11).
15 The State Bar suggests that AVCV is seeking "to expand the rights afforded to
16 crimes victims via rule modification under the auspices of [Ariz. Const. art. II, §
17 2.1(A)(11)]..." *State Bar* at 3. The State Bar relies on *Slayton v. Shumway*, 166
18 Ariz. 87 (1990) to dispute the justification for full integration, but any reliance on
19 *Slayton* is misplaced. *Slayton* involved a challenge to Prop. 104 being on the
20 November 1990 ballot. *Slayton v. Shumway*, 166 Ariz. at 88. The challenger
21 argued that Prop. 104 violated the single subject rule of the Arizona Constitution.
22 *Id.* Slayton acknowledged that the provisions now known as Ariz. Const. art. II, §§

1 2.1(A)(1)-(10) were so interrelated that they indeed formed a single subject. *Id.*
2 However, Slayton argued that the provision now known as Ariz. Const. art. II, §
3 2.1(A)(11), which pertains to rule making authority, was not sufficiently related.
4
5 *Slayton v. Shumway*, 166 Ariz. at 88-89. Slayton's challenge was limited to the
6 clause that gave rule making authority to the legislature. Slayton read the provision
7 very broadly as to transfer rule making authority from this Court to the state
8 legislature. *Id.* The Prop 104 Task Force took an appropriate, narrow view of the
9 provision by acknowledging that rulemaking authority granted to the legislature is
10 for the limited purpose of protecting victims' rights. *Slayton v. Shumway*, 166
11 Ariz. at 92.

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14 *Slayton* is distinguishable from AVCV's petition. AVCV is not seeking to
15 amend the rules by legislative action nor is AVCV attempting to amend rules that
16 do not implicate victims' rights. Rather, AVCV filed its rule change petition in
17 accordance with Rule 28 of the Rules of the Arizona Supreme Court. AVCV
18 simply seeks to give effect to the VBR by ensuring that trial judges and attorneys
19 know when and how victims' rights are applicable at various times throughout the
20 criminal justice process, which will allow victims meaningful participation into the
21 day-to-day workings of the process.
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24 ***Usurping the Role of the Prosecutor***

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1 APDA/AACJ additionally suggests that AVCV is attempting to intrude on
2 the “exclusive province of the state.” *APDA/AACJ* at 6. And, that integrating
3 victims’ rights into the rules of procedure would give victims’ attorneys
4 “unprecedented power,” but without the “ethical obligations and responsibilities of
5 the prosecutor.” *APDA/AACJ* at 6. Nothing in AVCV’s proposed modifications
6 usurps the role of the prosecutor. Rather, AVCV’s proposed modifications direct
7 courts to consider victims’ rights when one may be implicated.
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10 ***Victims Who Have Not Asserted Rights and Fair Application***

11 APAAC expressed concern that AVCV’s proposed modification of
12 removing victims’ duties would result in delay as courts attempt to seek victim
13 input from victims who may not have invoked rights. The “criminal rules do not
14 clearly differentiate those victims who have invoked their rights from those who
15 have not.” *APAAC* at 2-3. The joint comment adds the victim’s duties provision
16 back into the newly numbered rule and should alleviate any further concern.
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19 Additionally, the joint comment revises AVCV’s original petition from
20 “victim’s attorney” to “victim” throughout the petition to ensure the rules are
21 applied fairly to unrepresented victims. Joint Comment at 3.
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23 ***Repeal of Rule 39***

24 APAAC; the Hon. Sam Myers; APDA/AACJ; and the State Bar are opposed
25 to repealing Rule 39. *APAAC* at 11; *Hon. Sam Myers* at 1-2; *APDA/AACJ* at 3; and

1 the *State Bar* at 2. The commenters view Rule 39 as “crucial to the process,”
2 having value as an “umbrella rule,” and as a “comprehensive overview” relied on
3 by judicial officers.” *State Bar* at 2; *APDA/AACJ* at 3 and *Hon. Sam Myers* at 1.
4 Rule 39 does indeed list victims’ rights. However, it does not guide trial court
5 judges and attorneys on how to apply victims’ rights to various parts of the
6 process, which can lead to a misunderstanding of when victims may be heard and
7 when a right is implicated.
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10 Despite A.R.S. §13-4437(A) which bestows standing on a victim “to seek an
11 order, to bring a special action or to file a notice of appearance in an appellate
12 proceeding, seeking to enforce any right to challenge an order denying any right,”
13 there isn’t a provision in Rule 39 that guides trial courts and attorneys on how
14 victims or victims’ attorneys implement these rights. The result is there are a
15 number of attorneys practicing in Arizona’s criminal courts who are unaware that
16 victims may seek orders in writing. *APDA/AACJ* and the *State Bar* purport that
17 victims’ attorneys may not file motions and that the right to be heard pertains to
18 hearings that may result in release. *APDA/AACJ* at 4, 8.; *State Bar* at 7. To the
19 contrary, victims can be heard when a victims’ right is implicated and may file
20 written pleading with the court. *State ex rel. Montgomery v. Padilla*, 238 Ariz. 560,
21 566 (App. 2015) (A request for an order in a criminal case must be timely, in
22 writing, served and filed with the court). Integration of victims’ rights throughout
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1 the rules of procedure clarifies when victims' rights apply and when they may be
2 asserted, either by oral motion or written motion, by a victim or a victim's counsel.

3 **Specific Concerns**

4 **Rule 1.3 Computation of Time**

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6 The State Bar of Arizona states that AVCV's original proposed modification
7 of this rule that includes "or crime victim," would elevate victims to a party.
8 APAAC raised a concern that adding "or crime victim" to Rule 1.3 should be
9 clarified to be consistent with A.R.S. § 13-4437(A), which gives victims "standing
10 to seek an order, to bring a special action or file a notice of appearance in an
11 appellate proceeding" in order to enforce a right or to challenge a denial of a right.
12 Because Rule 1.3 pertains only to the computation of time and the joint comment
13 adds a provision to Rule 1.9, to be clear that victims may only file motions,
14 responses, and replies on matters that impact victims' rights, AVCV's proposed
15 amendment to Rule 1.3 should be accepted.

16 **Rule 1.5 Defendant's Appearance by Video Conference**

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18 The State Bar objects to AVCV's proposed amendment seeking to ensure
19 that any audio-visual system will allow victims a means to view and participate in
20 the proceedings and ensure all compliance with victims' rights laws. AVCV
21 merely seeks to ensure this provision will still allow a victim to be present and
22 heard regardless of how a defendant appears before a court.

1 **Rule 4.2 Initial Appearance**

2 The State Bar objects to AVCV’s proposed amendment to Rule 4.2(c),
3 which clarifies the rule to include a victim’s right to notice and an opportunity to
4 be present and heard. The State Bar states this right already exists in the VBR.
5 Regardless, AVCV’s proposed amendment should be adopted.
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7 **Rule 5.1 Preliminary Hearings/Continuance**

8 The State Bar is opposed to AVCV’s proposed change to Rule 5.1(c)(2)
9 requiring a magistrate to consider a victim’s speedy trial right before continuing a
10 preliminary hearing. *State Bar* at 7-8. The joint comment deleted AVCV’s original
11 proposed change and suggested the following instead: “A magistrate may
12 continue the hearing only, if after consideration of the victim’s right to a speedy
13 trial, the court finds that extraordinary circumstances exist and that delay is
14 indispensable to the interests of justice.” Based on the overall opposition put forth
15 by the State Bar, AVCV is assuming that they may still oppose the modification.
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18 The State Bar reasons that a right to a speedy trial is neither particular nor
19 unique to victims. *Id.* It claims that a consideration of a victim’s speedy trial right
20 runs afoul of established case law and the rights of the accused to run
21 “subservient” to those of the victim. *State Bar* at 8. It cites two cases in
22 opposition to AVCV’s proposed change in footnotes 8 and 9. Yet, neither stand for
23 the proposition that a trial court judge can not consider a victim’s right to a speedy
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1 trial. A trial judge can and, more importantly, should consider the rights of all
2 involved when making continuance decisions. This Court recently noted the
3 importance of a victim's speedy trial right in *State ex rel. Montgomery v. Gates*
4 when it held that a capital defendant may now void a pretrial waiver of an
5 intellectual disability determination by withdrawing an earlier objection. *State ex*
6 *rel. Montgomery v. Gates*, 243 Ariz. 451, ¶ 16 (Ariz. 2018) (noting that in making
7 a post waiver determination of whether a capital defendant is entitled to a pre-trial
8 determination of intellectual disability, the trial court must consider prejudice to
9 the victims including their constitutional right to a speedy trial).

12 **Rule 6.7 Appointment of Investigators and Expert Witnesses for**
13 **Indigent Defendants**

14 Comments to AVCV's original proposed amendment to Rule 6.7(d),
15 submitted by APAAC, the Hon. Sam Myers, and the State Bar, which would have
16 changed the time a capital defendant may make a motion for an expert or
17 mitigation specialist from 60 days to 30 days, in accordance with a victim's speedy
18 trial right, is that it is a substantive change and unrelated to the protections found in
19 the VBR. The joint comment removes this amendment and instead proposes an
20 amendment to Rule 6.7(a): "After considering the victim's right to a speedy trial,
21 the court should impose reasonable deadlines on anyone appointed under this
22 rule." The provision added to Rule 6.7(a) is not a substantive change and serves
23 to remind the trial court that victims also have a constitutional right to a speedy
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1 trial. Ariz. Const. art. II, § 2.1(A)(10). Additionally, the VBR requires that “all
2 rules governing criminal procedure and the admissibility of evidence in all criminal
3 proceedings protect victims’ rights...” Ariz. Const. art. II, § 2.1(A)(11). Rule 6.7,
4 like any other court rule, must be read to protect a victim’s constitutional right to a
5 speedy trial.
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7 **Rule 8.1 Speedy Trial**

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9 The State Bar opposes AVCV’s original proposed amendment because Rule
10 39 already addresses a victim’s right to a speedy trial. *State Bar* at 9. AVCV’s
11 original proposed amendment was modified by the joint comment, which should
12 be accepted by this Court.
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14 **Rule 8.4 Excluded Periods**

15 The State Bar contended that excluded periods are unrelated to the VBR.
16 *State Bar* at 10. The joint comment deletes AVCV’s original proposed
17 modification. Thus, the State Bar’s concern should be alleviated.
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19 **Rule 8.5 Continuing a Trial Date**

20 The State Bar contends that AVCV’s proposed amendment is redundant and
21 that it “attempts to elevate a victim’s speedy trial right to one superior to a
22 defendant’s Sixth Amendment right to the effective assistance of counsel as well as
23 his Fourteenth Amendment right to procedural due process.” *State Bar* at 10. The
24 joint comment deletes AVCV’s proposed amendment and simply requires: “A
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1 court may continue trial only after considering a victim's and the defendant's right
2 to a speedy trial and on a showing that extraordinary circumstances exist and that
3 delay is indispensable to the interests of justice . . .” The joint comment may
4 alleviate the concerns of the State Bar by requiring a mere consideration of a
5 victim's speedy trial right. If it does not, this Court, again, has recognized the
6 importance of considering victims' rights throughout the process. The modification
7 suggested by the joint comment is consistent with recent decisions of this Court
8 that victims' rights to a speedy trial and prompt and final conclusion warrant
9 consideration by trial courts. *Fitzgerald v. Myers*, 243 Ariz. 84, 402 P.3d 442, 450
10 (2017); *State v. Gates*, 243 Ariz. 451, 410 P.3d 433, 436-37 (2018).

14 **Rule 9.3 Exclusion of Witnesses and Spectators**

15 APAAC's expressed concern that AVCV's original proposed amendment
16 that would allow the trial court to close the court room when there is a finding of a
17 clear and present danger “to the victim's rights to be treated with fairness, respect,
18 and dignity, and to be free from intimidation, harassment, and abuse” may conflict
19 with a defendant's right to a public trial. *APAAC* at 5-6. The joint comment
20 removes this proposed amendment. Thus, any and all concerns about AVCV's
21 original proposed amendment to this rule should be alleviated.

24 **Rule 10.3 Changing the Place of Trial**

1 The State Bar opposes AVCV's proposed modification that would allow
2 victim to be heard on the matter and considering the victim's right to be present at
3 trial. The State Bar views this as providing the victims a right to be heard on the
4 legal justification for a change of venue. *State Bar* at 11. The joint comment
5 changes the original proposed amendment to read: "A party seeking to change the
6 place of trial must file a motion seeking that relief. The motion must be filed
7 before trial, and, in superior court, at or before a pretrial conference. The victim
8 has the right to be heard on the matter. The court must consider the victim's right
9 to be present and consider alternatives to moving the trial that will protect the
10 defendant's right to a fair trial while reasonably allowing the victim to exercise the
11 right to be present." A victim's right to be heard and a consideration of their right
12 to be present are important factors that trial courts should consider before granting
13 a change in venue.

17 **Rule 15.1 The State's Disclosures**

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19 AVCV's original proposed amendments included adding provisions to Rules
20 15.1(e)(1)(B) and 15.1(e)(2) that would have required the trial court to consider a
21 victim's right to be treated with fairness, respect, and dignity, and to be free from
22 intimidation, harassment, and abuse before access to 911 tapes would be permitted.
23 The joint comment removes this proposed amendment. Thus, any concerns
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1 expressed by APAAC, the Hon. Sam Myers, and the State Bar-Criminal should be
2 alleviated.

3
4 AVCV's original proposed amendments include a provision that would
5 amend Rule 15.1(g)(1) to allow a court to order any person "other than the victim"
6 to make material and information available to the defendant when certain
7 conditions are met. APAAC acknowledges that this is consistent with a victim's
8 constitutional right to refuse a discovery request under Ariz. Const. art. II, §
9 2.1(A)(5), but notes the limited exception created by the Court of Appeals in *State*
10 *ex rel. Romley v. Superior Court (Roper)*, 172 Ariz. 322 (App. 1992). APAAC at
11 7-8. The *Roper* Court determined there are circumstances in which the VBR must
12 yield to a defendant's federal and state due process rights. 172 Ariz. at 240.
13 APAAC proposes that the rule be amended to read "other than the victim absent a
14 determination by the court that the evidence would be exculpatory." AVCV does
15 not dispute the limited exception specific to the facts of *Roper* but does not believe
16 it is necessary to amend the rule beyond "other than the victim." APAAC at 7-8.
17 Fully integrating victims' rights requires that the rule provisions are consistent with
18 the VBR and its implementing legislation. Expanding the proposed amendment
19 beyond that may be viewed as a substantive change in the rule. There is already
20 existing case authority that trial court may turn to when faced with a conflict
21 between the rights of a victim and the rights of the accused.
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1 APAAC and the Hon. Sam Myers noted that Rules 15.1(i)(3)(A)(i),
2 15.1(i)(4)(A) and (B), and 15.2(h)(2) of AVCV's original proposed amendments
3 added a provision to these rules "except that a victim's address or other locating
4 information need not be disclosed." APAAC notes that AVCV did not integrate
5 current Rule 39(b)(11)(A) that contains an exception to when a victim's identifying
6 and locating information may be disclosed. The joint comment removes AVCV's
7 original proposed amendments to these rules and adds the exception provision to
8 Rule 15.1.
9

11 **Rule 15.2 The Defendant's Disclosures**

12 The State Bar opposes AVCV's proposed amendment to Rule 15.2(h)(1)(B)
13 that would require trial courts to consider a victim's speedy trial right when
14 deciding to extend the deadline for a defendant's disclosures in capital cases. They
15 contend that AVCV's proposed amendment conflicts with a defendant's right to
16 due process. However, following recent case authority of this Court as mentioned
17 above, a consideration of a victim's constitutional right to a speedy trial is
18 appropriate when trial may be delayed because of extensions given to either party
19 during discovery.
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23 **Rule 16.3 Pretrial Conference**

24 AVCV's original proposed amendments included adding "after considering
25 the views of the victim" to Rule 16.3(d). The Hon. Sam Myers and the State Bar

1 state that it is an expansion of victims’ rights; rights currently not found in Rule 39.
2 *State Bar* at 14; and *Hon. Sam Myers* at 2. APAAC suggested the amendment be
3 clarified to apply only to continuances considered at the pretrial conference as
4 outlined in A.R.S. § 13-4435(F). APAAC at 8-9. The joint comment removed the
5 amendment from Rule 16.3(d) and instead proposes an amendment to Rule
6 16.3(d)(2) that clarifies the scope of a pretrial conference to include that a court
7 may set additional pretrial conferences and evidentiary hearings as appropriate
8 “after considering the rights and views of the victim, the victim’s right to a speedy
9 trial, and the victim’s right to be present at all proceedings.” Making the
10 amendment proposed by the joint comment consistent with A.R.S. § 13-4435(F),
11 as APAAC suggests, would limit a victim to only being heard regarding their
12 speedy trial rights when other rights may be implicated at a pretrial hearing. This is
13 inconsistent with A.R.S. § 13-4437(A), giving victims standing “to seek an order,
14 to bring a special action or to file a notice of appearance in an appellate
15 proceeding, seeking to enforce any right to challenge an order denying any right.”

20 **Rule 16.4 Dismissal of Prosecution**

21 AVCV’s original proposed amendments include adding a provision to Rule
22 16.4(a) that would require a trial court to consider the views of the victims before
23 granting the State’s motion to dismiss a prosecution. APAAC and the State Bar
24 both expressed concern that a consideration of the views of the victim inserts the
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1 court in the State's decision whether or not to go forward or to dismiss a case.
2 *APAAC* at 9-10; *State Bar* at 15-16. However, even before AVCV's proposed
3 amendment, the court is already inserted in that decision and appears to have
4 discretion to either grant or deny the State's motion... "the court may order a
5 prosecution dismissed..." Ariz. R. Crim. P. 16.4(a); Allowing a victim to be heard
6 before a prosecution is dismissed will give effect to a victim's constitutional right
7 to justice and due process. Ariz. Const. art. I, § 2.1(A). Considering the views of
8 the victim does not require any court to agree with the victim, but to merely
9 consider their constitutional rights to justice and due process.

12 AVCV also proposes a similar amendment to Rule 16.4(d) that would
13 require the trial court to consider a victim's constitutional right to justice and due
14 process before dismissing a case with prejudice. *APAAC* and the State Bar
15 caution that is a purely legal determination which must weigh all of the factors that
16 bear on the issue, but that a victim's right to justice and due process should be
17 inherent in an interest of justice determination. *Id.* AVCV does not direct the
18 court to agree with the victim, but to provide mere consideration of the victim's
19 rights before a decision, one that generally can't be undone, is made.

22 **Rule 31. Suspension of These Rules; Suspension of an Appeal;**
23 **Computation of Time; Modifying a Deadline**

24
25 The State Bar oppose AVCV's proposed modification to include a
consideration of victims' rights before an appeal is suspended. *State Bar* at 16-17.

It argues there are “no *specific, unique, peculiar* right created by the VBR with respect to whether or not an appellate court should suspend an appeal.” *Id.* Yet, victims do have constitutional right to a prompt and final conclusion of the case after conviction and sentence. Ariz. Const. art. II, § 2.1(A)(10). Thus, it is appropriate for the views of the victim to be considered.

Conclusion

For the reasons set forth in this reply, the joint comment, and AVCV's original petition, it is respectfully requested that this Court fully integrate victims' rights throughout the rules of procedure and repeal Rule 39.

Respectfully submitted July 2, 2018.¹
ARIZONA VOICE FOR CRIME VICTIMS

BY: /s/
COLLEEN CLASE

¹ The Office of the Clerk of the Supreme Court advised on Friday, June 29, 2018 that this reply is due on Monday July 2, 2018 as June 30, 2018 falls on a Saturday.